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# THE ENGLISH COURT'S SERVICE-OUT JURISDICTION IN INTERNATIONAL TORTIOUS DISPUTES

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## I. Introduction

The English court's power, in a cross-border commercial dispute, to grant an order for the service of proceedings on a defendant outside of its territory is a well-established part of its national rules of jurisdiction. First introduced under the Common Law Procedure Act 1852, this jurisdiction is presently codified within Part 6 of the Civil Procedure Rules ('C.P.R.').<sup>1</sup> C.P.R., r. 6.36 confirms the claimant's right to seek permission to serve proceedings on a foreign-based defendant, in those cases which either fall entirely outside the material scope of the Brussels Regime<sup>2</sup> or those which are covered by Article 6(1) of the Brussels Ia Regulation<sup>3</sup> and Article 4(1) of the Lugano II Convention.<sup>4</sup>

Unlike the other two bases for adjudicatory competence within the English national rules – namely, the defendant's *submission* to the English proceedings and the defendant's *presence* in England at the time the claim form is served – the power to serve proceedings out of the jurisdiction is discretionary in nature.<sup>5</sup> The relevant considerations for the application of this discretionary jurisdiction are spelt out in the House of Lords' decision in *Seaconsar Far East Ltd v Bank Markazi Jomhuri Islami Iran*.<sup>6</sup> According to this ruling, a claimant, seeking to serve a claim form on a foreign-based defendant, has to establish that: (a) there is a "serious issue to be tried" in the case; (b) the claim falls within the confines of one of the jurisdictional "gateways" currently listed within C.P.R. P.D. 6B para. 3.1; and, (c) England is *forum conveniens* – i.e., the proper forum in which the proceedings should be entertained.

This article is broadly concerned with the English court's service-out jurisdiction in international tortious disputes. In this context, C.P.R. P.D. 6B para. 3.1(9) outlines the relevant jurisdictional gateways. Based on this provision

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<sup>1</sup> From 1883 until 1999, these rules had been set out under Order 11 of the Rules of the Supreme Court.

<sup>2</sup> Brussels Regime covers provisions within the Regulation (E.U.) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] O.J. L. 351/1 (hereafter, "Brussels Ia Regulation") and the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] O.J. L. 339/3 (hereafter, the "Lugano II Convention").

<sup>3</sup> Under Article 6(1) "if the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25 [of the Brussels Ia Regulation], be determined by the law of that Member State".

<sup>4</sup> According to Article 4(1) "If the defendant is not domiciled in a State bound by this Convention, the jurisdiction of the courts of each State bound by this Convention shall, subject to the provisions of Articles 22 and 23 [of the Lugano II Convention], be determined by the law of that State".

<sup>5</sup> Lord Collins of Mapesbury, *et al*, *Dicey, Morris & Collins on the Conflict of Laws*, 15<sup>th</sup> edn., (London: Sweet & Maxwell, 2012), Rule 34, at para. 11.141.

<sup>6</sup> [1994] A.C. 438. More recently, these requirements were reiterated in Lord Collins of Mapesbury's judgment in *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 W.L.R. 1804 at [71], [81] and [88].

“the claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where (a) damage was sustained, or will be sustained, within the jurisdiction; or (b) damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction.”

The discussion which follows focuses specifically on the meaning of “damage” for the purpose of gateway 9(a). This provision was first introduced into (what is now) the C.P.R. in 1987.<sup>7</sup> Its creation has been widely considered, amongst legal academics,<sup>8</sup> as aligning the tort gateways within the C.P.R. with the special jurisdiction rule in matters relating to tort, delict or quasi-delict under (what is now) Article 7(2) of the Brussels Ia Regulation, as interpreted by the Court of Justice (‘CJEU’) in *Handelswekerij GJ Bier BV v Mines de Potasse d’Alsace SA*.<sup>9</sup> Indeed, the English court has traditionally relied on the CJEU’s jurisprudence,<sup>10</sup> in interpreting gateway 9(a), and construed the provision as covering only those instances where damage that was *directly* felt by the *immediate* victim of the wrongful act had been sustained in England.<sup>11</sup> More recently, though, another body of English authorities has emerged which points to a different interpretive approach.<sup>12</sup> In these cases, C.P.R. P.D. 6B para. 3.1(9)(a) has been ascribed a much wider scope and is said to include *indirect (as well as direct)* damages suffered by the victim (or their family members) in England.

In short, there is confusion surrounding the precise meaning of damage under gateway 9(a). This article seeks to address this uncertainty. The discussion which follows is presented in three main parts. Part II outlines an account of the English court’s traditional approach to the interpretation of the provision. Part III, then, analyses the emergence of a stream of precedent which evidences a divergence from the traditional position. Finally, Part IV seeks to address the apparent confusion in the law by identifying and advancing a reasoned case in support of the most plausible interpretation for gateway 9(a). In this respect, it is argued that the English court should unequivocally revert to its traditional interpretation and read C.P.R.

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<sup>7</sup> At the time of its creation, Order 11(1)(f) of the Rules of the Supreme Court was the relevant provision.

<sup>8</sup> E.g. P.M. North and J.J. Fawcett, *Cheshire & North’s Private International Law*, 11<sup>th</sup> edn., (London: Butterworths, 1987), at p. 202 and L. Collins, *et al*, *Dicey and Morris on The Conflict of Laws*, 11<sup>th</sup> edn., (London: Stevens & Sons Ltd, 1987), Rule 28(6), at p. 328. More recently, see Lord Collins of Mapesbury, *et al*, *Dicey, Morris & Collins on the Conflict of Laws*, 15<sup>th</sup> edn., (London: Sweet & Maxwell, 2012), at para. 11.214.

<sup>9</sup> [1976] (Case 21/76) E.C.R. 1735. Strictly speaking, the *Bier* case concerned the interpretation of Article 5(3) of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. However, there is virtually no difference between Article 5(3) of that instrument and the equivalent rules under Article 5(3) of the Brussels I and Article 7(2) of the Brussels Ia Regulations. Hence, there is no reason why the Court of Justice case law on the interpretation of Article 5(3) of the Convention and Brussels I should not apply to the construction of Article 7(2) of the Brussels Ia Regulation.

<sup>10</sup> E.g. *Dumez France SA v Hessische Landesbank Case* [1990] (Case 220/88) E.C.R. I-49; *Marinari v Lloyds Bank Plc* [1995] (Case C-364/93) E.C.R. I-2719; *Réunion Européenne SA v Spliethoff’s Bevrachtungskantoor BV* [1998] (C-51/97) E.C.R. I-6511; and, *Zuid-Chemie BV v Philippo’s Mineralenfabriek NV/SA* [2009] (Case C-189/8) E.C.R. I-6917.

<sup>11</sup> E.g. *Metall und Rohstoff v Donaldson Lufkin & Jenrette* [1990] 1 Q.B. 391; *Bastone & Firminger Ltd v Nasima Enterprises (Nigeria) Ltd* [1996] C.L.C. 1902; *Beecham Group plc v Norton Healthcare Ltd* [1997] F.S.R. 81; *ABCI v BFT* [2003] EWCA Civ 205; [2003] 2 Lloyd’s Rep. 146; *Newsat Holdings Ltd v Zani* [2006] EWHC 342 (Comm); [2006] 1 Lloyd’s Rep. 707; *Erste Group Bank AG (London) v JSC (VMZ Red October)* [2015] EWCA Civ 379; and, *Brownlie v Four Seasons Holdings Inc* [2015] EWCA Civ 665; [2015] C.P. Rep. 40.

<sup>12</sup> E.g. *Booth v Phillips* [2004] EWHC 1437 (Comm); [2004] 1 W.L.R. 3292; *Cooley v Ramsey* [2008] EWHC 129 (QB); [2008] I.L.Pr. 27; *Saldanha v Fulton Navigation Inc* [2011] EWHC 1118 (Admlty); [2011] 2 Lloyd’s Rep. 206; *Wink v Croatia Osiguranje DD* [2013] EWHC 1118 (QB); *Stylianou v Toyoshima* [2013] EWHC 2188 (QB); and *Pike v Indian Hotels Co Ltd* [2013] EWHC 4096 (QB).

P.D. 6B para. 3.1(9)(a) consistently with the construction of Article 7(2) of the Brussels Ia Regulation.

## II. The Traditional Approach

C.P.R. P.D. 6B para. 3.1(9)(a) is a relatively new jurisdictional gateway. Prior to its introduction in 1987, a plaintiff, who sought to commence cross-border tort proceedings in England against a foreign-based defendant, had to establish that the claim had been “founded on a tort committed within the jurisdiction”. Consequently, the place where the damage was sustained was of no relevance in the court’s decision whether to allow the tort proceedings to be served outside England.<sup>13</sup>

However, since 1987, if the claimant can show that it sustained “some significant damage ... in England”,<sup>14</sup> the English court can, *ceteris paribus*, decide to summon the foreign-based defendant. At the time, this legal development was widely regarded, within academic circles,<sup>15</sup> as having been introduced in order to align this aspect of English law with the rules of jurisdiction in matters relating to tort, delict or quasi-delict, that are presently outlined under Article 7(2) of the Brussels Ia Regulation. Article 7(2) provides that, in the context of cross-border tortious disputes, “a person domiciled in a Member State may be sued in another Member State ... in the courts for the place where the harmful event occurred”. In this context, the place where the harmful event occurred includes “both the place where the damage occurred and the place of the event giving rise to it”.<sup>16</sup>

In identifying “the place where the damage occurred”, the CJEU has made it plain that regard must be had to the location where the *immediate* victim suffered damage *directly* ensuing from the harmful act.<sup>17</sup> Illustrative, in this context, is the CJEU’s ruling in *Dumez France v Hessische Landesbank*.<sup>18</sup> In this case, the plaintiff, a French company, sustained losses in France after the insolvency, in Germany, of its German subsidiary. It argued that the insolvency in question, and the resulting losses, had been caused by the German defendant’s tortious conduct. Subsequently, the plaintiff commenced tort proceedings in France against the defendant. Unsure as to whether it had jurisdiction to entertain the case under (what is now) Article 7(2) of the Brussels Ia Regulation,<sup>19</sup> the French court sought a preliminary ruling from the CJEU. More specifically, the French court asked whether “the term ‘place where the damage occurred’ ... [could] be understood to refer to the place where the *indirect victims* of the harm discover the harmful consequences to their own property”.<sup>20</sup> In response, the CJEU stated that, for the purpose of Article 7(2), the location where the damage occurred

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<sup>13</sup> See, e.g., du Parc L.J. in *George Monro Ltd v American Cyanamid & Chemical Corporation* [1944] K.B. 432 at 441.

<sup>14</sup> Slade L.J. in *Metall und Rohstoff v Donaldson Lufkin & Jenrette* [1990] 1 Q.B. 391 at 437, Stocker and Bingham L.J.J. concurring.

<sup>15</sup> L. Collins, *et al*, *Dicey and Morris on The Conflict of Laws*, 11<sup>th</sup> edn., (London: Stevens & Sons Ltd, 1987), Rule 28(6), at p. 328 and P.M. North and J.J. Fawcett, *Cheshire & North’s Private International Law*, 11<sup>th</sup> edn., (London: Butterworths, 1987), at p. 202.

<sup>16</sup> *Handelswekerij GJ Bier BV v Mines de Potasse d’Alsace SA* [1976] (Case 21/76) E.C.R. 1735 at [24].

<sup>17</sup> For a detailed discussion of the CJEU’s case law in this area see e.g. A. Briggs, *Civil Jurisdiction and Judgments*, 6<sup>th</sup> edn., (Abingdon: Informa Law from Routledge, 2015), at paras. 2.201-2.204; A. Briggs, *Private International Law in English Courts*, (Oxford: Oxford University Press, 2014), at paras. 4.262-4.268; and Lord Collins of Mapesbury, *et al*, *Dicey, Morris & Collins on the Conflict of Laws*, 15<sup>th</sup> edn., (London: Sweet & Maxwell, 2012), Rule 35(3), at paras. 11R.284-11.292.

<sup>18</sup> [1990] (Case 228/88) E.C.R. I-49.

<sup>19</sup> At the time, Article 5(3) of the Brussels Convention.

<sup>20</sup> [1990] (Case 228/88) E.C.R. I-49 at [15] (emphasis added).

refers only to “the place where the causal event, giving rise to [tortious] liability, *directly* produced the harmful effects in relation to the person who is the *immediate* victim”.<sup>21</sup>

A very similar reasoning formed the basis of the CJEU’s ruling in *Marinari v Lloyd’s Bank Plc.*<sup>22</sup> Unlike *Dumez France*, *Marinari* concerned the direct victim of an alleged tort. In this case, the plaintiff, an Italian domiciliary, brought tort proceedings against the English defendant in Italy. The plaintiff submitted that he had suffered financial loss in Italy which, he alleged, had been caused by the defendant’s tortious actions. The CJEU was asked to decide on whether the Italian court could entertain the case under (what is now) Article 7(2) of the Brussels Ia Regulation. In answer to this question, the CJEU, yet again, emphasised that, when interpreting Article 7(2), the main point was to identify the place where the damage was *directly* inflicted (rather than the place where it was subsequently felt). Hence, it stated that the place where the damage occurred did not include a place where “the victim claims to have suffered financial damage *consequential* on initial damage arising and suffered by him in another ... state”.<sup>23</sup>

As indicated earlier, it was generally accepted that the introduction of the jurisdictional gateway under (what is now) C.P.R. P.D. 6B para. 3.1(9)(a) aligned this area of English law with Article 7(2) of the Brussels Ia Regulation. Consequently, the English court traditionally interpreted gateway 9(a) in a consistent manner with the CJEU’s jurisprudence on the construction of Article 7(2). This state of affairs is helpfully illustrated in the Court of Appeal’s decision in *ABCI v BFT*.<sup>24</sup>

In this case, the claimants, having entered into a share-purchase agreement with the defendants, accused them of misrepresentation and conspiracy to defraud. The claimants argued that they made the decision to enter into the ill-fated venture in England. Moreover, they contended that, England was where the relevant payment arrangements for the purchase of the shares had been made. The defendants resisted the English court’s jurisdiction on the basis that the claimant’s case did not fall within the scope of C.P.R. P.D. 6B para. 3.1(9). Mance L.J. (as he then was) noted that the jurisdictional gateway had been “introduced in 1987 in order to ensure that English law was consistent” with (what is now) Article 7(2) of the Brussels Ia Regulation.<sup>25</sup> Citing the CJEU’s ruling in *Dumez France*, he held that, “in our judgment, [what is now gateway 9(a)] is looking to the *direct* damage sounding in monetary terms which the wrongful act produced upon the claimant”.<sup>26</sup> On the facts, therefore, Mance L.J. ruled that damage had been sustained in Switzerland (rather than in England), as the relevant payment was made from the claimants’ account in Switzerland.

The *ABCI* ruling is only one example of the English court expressly relying on the CJEU’s construction of (what is now) Article 7(2) of the Brussels Ia Regulation in

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<sup>21</sup> [1990] (Case 228/88) E.C.R. I-49 at [20] (emphasis added).

<sup>22</sup> [1995] (Case C-364/93) E.C.R. I-2719.

<sup>23</sup> [1995] (Case C-364/93) E.C.R. I-2719 at [15] (emphasis added). See similarly *Réunion Européenne SA v Spliethoff’s Bevrachtungskantoor BV* [1998] (C-51/97) E.C.R. I-6511; *Kronhofer v Maier* [2004] (Case C-168/02) E.C.R. I-6009; [2005] 1 Lloyd’s Rep. 284; and *Zuid-Chemie BV v Philippo’s Mineralenfabriek NV/SA* [2009] (Case C-189/8) E.C.R. I-6917. See, recently, Case (C-350/14) *Florin Lazar v Allianz SpA* EU:C:2015:802; [2016] I.L.Pr. 5. In this case, the CJEU ruled that Article 4(1) of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (‘Rome II Regulation’) should be interpreted in the same way as Article 7(2) of the Brussels Ia Regulation. Thus, the applicable law to a tortious dispute under Article 4(1) of Rome II Regulation is the law of the place in which damage *directly* arising from the tortious act was inflicted on the *immediate* victim.

<sup>24</sup> [2003] EWCA Civ 205; [2003] 2 Lloyd’s Rep. 146.

<sup>25</sup> [2003] EWCA Civ 205; [2003] 2 Lloyd’s Rep. 146 at 161.

<sup>26</sup> [2003] EWCA Civ 205; [2003] 2 Lloyd’s Rep. 146 at 161 (emphasis added), Tuckey L.J. and Black J. concurring.

interpreting gateway 9(a).<sup>27</sup> Indeed, for nearly two decades after the introduction of this C.P.R. gateway, this state of affairs was widely reflected in the academic commentary.<sup>28</sup> Nevertheless, there were also those who held a different view. Most notable among these commentators were the editors of *Civil Jurisdiction and Judgments*. Writing in its third edition, published in 2002, they opined that the damage, for the purpose of (what is now) gateway 9(a), should have a broader scope than that under the jurisdictional rule (currently outlined) within Article 7(2). In particular, they argued that, notwithstanding the English law's traditional reading of gateway 9(a), there was "no compelling reason to apply" the CJEU's case law on the interpretation of Article 7(2) "outside the field of application of the [Brussels Regime]".<sup>29</sup> They, therefore, considered that the gateway "may in principle [include] cases where the damage is felt in England *indirectly or consequentially*, as a result of other acts or damage sustained elsewhere".<sup>30</sup> In this respect, the editors of *Civil Jurisdiction and Judgments*, in effect, advocated an approach to the construction of C.P.R. P.D. 6B para. 3.1(9)(a) which had been commonly applied in relation to the interpretation of a similar tort gateway in Canada<sup>31</sup> and Australia.<sup>32</sup>

### III. (An Abortive) Departure from the Traditional Approach?

Given that the case law and the majority of the academic commentators clearly stated that there should be an alignment in the interpretation of gateway 9(a) and the equivalent provision (presently stated) under Article 7(2) of the Brussels Ia Regulation, it was difficult to conceive that the English court would embrace the construction proposed by the editors of *Civil Jurisdiction and Judgments*. However, over the past decade or so, this (broader) stance on the interpretation of gateway 9(a) has been endorsed (and applied) in a number of first-instance authorities. These cases,<sup>33</sup> which have become numerous over a relatively short period of time, show that the meaning accorded to the gateway has been expanded as to include *indirect (as well as direct)* damages sustained by the victim (or their family members) in England.

#### (a) *The decision in Booth v Phillips*

In this context, the first case to consider is *Booth v Phillips*.<sup>34</sup> In this case, an English claimant commenced proceedings against a number of foreign-based defendants. The claim

<sup>27</sup> See also, traditionally, *Bastone & Firminger Ltd v Nasima Enterprises (Nigeria) Ltd* [1996] C.L.C. 1902; *Beecham Group plc v Norton Healthcare Ltd* [1997] F.S.R. 81; and, *Newsat Holdings Ltd v Zani* [2006] EWHC 342 (Comm); [2006] 1 Lloyd's Rep. 707.

<sup>28</sup> E.g. P.M. North and J.J. Fawcett, *Cheshire and North's Private International Law*, 12<sup>th</sup> edn., (London: Butterworths, 1992), at p. 199; P.M. North and J.J. Fawcett, *Cheshire and North's Private International Law*, 13<sup>th</sup> edn., (London: Butterworths, 1999), at pp. 306-307; A. Briggs and P. Rees, *Civil Jurisdiction and Judgments*, 3<sup>rd</sup> edn., (London: LLP, 2002), at para. 4.40; J. Hill, *International Commercial Disputes in English Courts*, 3<sup>rd</sup> edn., (Oxford: Hart Publishing, 2005), at paras 7.3.29-7.3.30; and, C.M.V. Clarkson and J. Hill, *The Conflict of Laws*, 3<sup>rd</sup> edn., (Oxford: Oxford University Press, 2006), at p. 94.

<sup>29</sup> A. Briggs and P. Rees, *Civil Jurisdiction and Judgments*, 3<sup>rd</sup> edn., (London: LLP, 2002), at para. 4.40.

<sup>30</sup> A. Briggs and P. Rees, *Civil Jurisdiction and Judgments*, 3<sup>rd</sup> edn., (London: LLP, 2002), at para. 4.40 (emphasis added, citations omitted).

<sup>31</sup> E.g. *Skyrotors Ltd v Carriere Technical Industries Ltd* (1979) 102 D.L.R. (3d) 323 and *Vile v Von Wendt* (1979) 103 D.L.R. (3d) 356.

<sup>32</sup> E.g. *Flaherty v Girgis* [1985] 4 N.S.W.L.R. 248.

<sup>33</sup> E.g., *Booth v Phillips* [2004] EWHC 1437 (Comm); [2004] 1 W.L.R. 3292; *Cooley v Ramsey* [2008] EWHC 129 (QB); [2008] I.L.Pr. 27; *Wink v Croatia Osiguranje DD* [2013] EWHC 1118 (QB); *Stylianou v Toyoshima* [2013] EWHC 2188 (QB); and *Pike v Indian Hotels Co Ltd* [2013] EWHC 4096 (QB).

<sup>34</sup> [2004] EWHC 1437 (Comm); [2004] 1 W.L.R. 3292.

had arisen following the death of the claimant's husband while working on board the defendants' vessel. The claimant sought, *inter alia*, to obtain the English court's permission for the service of proceedings outside of jurisdiction, pursuant to gateway 9(a). In particular, she argued that she had sustained damage within the jurisdiction because it was in England where her loss of dependency on her husband and the funeral expenses had been incurred. The defendants challenged that submission, in turn, arguing that the damage arising from the alleged wrongdoing had been sustained in Egypt, where the deceased suffered the fatal injury.

Nigel Teare Q.C. (as he then was) began by reiterating the familiar starting proposition – first stated by Slade L.J. in the *Metall und Rohstoff* case – that, for the purpose of gateway 9(a), “it was enough that ‘some significant damage’ had been sustained in England”.<sup>35</sup> Rather surprisingly, he was not referred to and (perhaps, consequently) did not discuss any of the authorities which highlighted the English court's traditional interpretation of C.P.R. P.D. 6B para. 3.1(9)(a). Instead, Nigel Teare Q.C. relied on a number of cases from Australia and Canada,<sup>36</sup> which had assumed a much wider scope for the notion of damage under the respective tort gateways in those jurisdictions than had traditionally been conceived of in England. He stated that these decisions were compatible with his reading of the word “damage” as outlined within subparagraph 9(a). Furthermore, Nigel Teare Q.C. considered that it was not unwarranted to interpret damage widely because, ultimately, the court's discretion whether to serve a claim form on a foreign-based defendant hinged on England being *forum conveniens*.<sup>37</sup> Accordingly, he concluded that, for the purpose of C.P.R. P.D. 6B para. 3.1(9)(a), England was the place where the losses suffered by the claimant had been sustained.<sup>38</sup>

*(b) The immediate fallout from the decision in Booth*

In its aftermath, it was not immediately apparent whether the decision in *Booth* had, indeed, brought about a sea change in the English court's approach to the interpretation of damage under gateway 9(a). In fact, for some time after the decision, *Booth* received very little attention within the case law. For example, no mention of the case was made in *Newsat Holdings Ltd v Zani*,<sup>39</sup> a first-instance case litigated in 2006. The court in this case had been primarily concerned with the interpretation of (what is now) gateway 9(b). Nevertheless, the question of whether damage had been sustained in England was argued as a secondary point. In response to it, and citing the decision in *ABCI*, David Steel J. stressed that, for the damage to fall within the scope of gateway 9(a), it had to be “direct damage, sounding in monetary terms”.<sup>40</sup>

Similarly, the reaction, within the academic commentary, to the decision in *Booth* further reinforced the impression that it was not to be treated as an authority of such significance to have instigated a change of approach in this aspect of English law. In fact, the majority of the legal commentators appeared to regard it as an anomalous ruling. For instance, in the third edition of *International Commercial Disputes in English Courts*, Professor Hill considered the decision as “surprising”.<sup>41</sup> In its 14<sup>th</sup> edition, published in 2006,

<sup>35</sup> [2004] EWHC 1437 (Comm); [2004] 1 W.L.R. 3292 at [38].

<sup>36</sup> [2004] EWHC 1437 (Comm); [2004] 1 W.L.R. 3292 at [40]-[42].

<sup>37</sup> [2004] EWHC 1437 (Comm); [2004] 1 W.L.R. 3292 at [36].

<sup>38</sup> [2004] EWHC 1437 (Comm); [2004] 1 W.L.R. 3292 at [44].

<sup>39</sup> [2006] EWHC 342 (Comm); [2006] 1 Lloyd's Rep. 707.

<sup>40</sup> [2006] EWHC 342 (Comm); [2006] 1 Lloyd's Rep. 707 at [49] (emphasis added).

<sup>41</sup> J. Hill, *International Commercial Disputes in English Courts*, 3<sup>rd</sup> edn., (Oxford: Hart Publishing, 2005), at para. 9.2.12.

the editors of *Dicey, Morris and Collins* only referred to the decision in passing, merely stating that it had followed the Canadian and Australian approach to the conception of damage sustained within the jurisdiction.<sup>42</sup> Even the editors of the fourth edition of *Civil Jurisdiction and Judgments* – who had, in the earlier edition, appeared to favour the approach ultimately adopted in *Booth* – made a fleeting (and incidental) reference to the case in a footnote, while still acknowledging the English court’s traditional approach to the interpretation of (what is now) C.P.R. P.D. 6B para. 3.1(9)(a), as exemplified in the *ABCI* case.<sup>43</sup>

(c) *Cooley v Ramsey*: *Booth* followed

In these circumstances, it was reasonable to have expected that the decision in *Booth* was destined to be a short-lived aberration, rather than the start of a transformation in the English court’s interpretation of the notion of damage under subparagraph 9(a). However, the English court’s reliance on *Booth*, when asked to rule on the interpretation of the gateway in *Cooley v Ramsey*,<sup>44</sup> suggested otherwise.

The dispute in *Cooley* had arisen from a road-traffic accident in New South Wales. The claimant, a British citizen, had suffered serious injuries in that accident, rendering him severely disabled. Following a period of rehabilitation in Australia, the claimant returned to England, where he was cared for by his parents. Subsequently, he started proceedings in negligence against the Australian-based defendant. One of the main issues for consideration was whether, for the purpose of C.P.R. P.D. 6B para. 3.1(9)(a), the claimant had sustained damage in England. The claimant relied on the decision in *Booth*, arguing that the economic loss which he had suffered in England – as a *consequence* of the tort committed in Australia – fell within the scope of gateway 9(a). In response, the defendant challenged the claimant’s reliance on the decision in *Booth*. In particular, the defendant questioned the grounds on which the decision in *Booth* had been made, especially the fact that the decision was inconsistent with the CJEU’s interpretation of (what is now) Article 7(2) of the Brussels Ia Regulation.

After a detailed discussion of the case,<sup>45</sup> Tugendhat J. followed Nigel Teare Q.C.’s judgment in *Booth*. In reaching this conclusion, he drew support from the observation, in the fourth edition of *Civil Jurisdiction and Judgments*,<sup>46</sup> that “there is no compelling reason” for the construction of C.P.R. P.D. 6B para. 3.1(9)(a) to follow that of the equivalent provision within the Brussels Regime.<sup>47</sup> In this respect, Tugendhat J. acknowledged that it may well have been that what is now set out under gateway 9(a) had been re-branded in 1987 in order to align the English law, in this area, with the position under the Brussels Regime. Nevertheless, he noted that, these systems of jurisdiction rules had not been “fully assimilate[d]” by the UK Parliament; “under the [Brussels Regime] the court retains no discretion, whereas [outside the scope of the Brussels Regime] there is the discretion to be

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<sup>42</sup> L. Collins, *et al* (eds.), *Dicey, Morris and Collins on The Conflict of Laws*, 14<sup>th</sup> edn., (London: Sweet & Maxwell, 2006), at para. 11.221.

<sup>43</sup> A. Briggs and P. Rees, *Civil Jurisdiction and Judgments*, 4<sup>th</sup> edn., (London: LLP, 2005), at para. 4.43.

<sup>44</sup> [2008] EWHC 129 (QB); [2008] I.L.Pr. 27.

<sup>45</sup> [2008] EWHC 129 (QB); [2008] I.L.Pr. 27 at [19]-[34].

<sup>46</sup> A. Briggs and P. Rees, *Civil Jurisdiction and Judgments*, 4<sup>th</sup> edn., (London: LLP, 2005), at para. 4.43.

<sup>47</sup> [2008] EWHC 129 (QB); [2008] I.L.Pr. 27 at [36].



found under [gateway 9(a)]”.<sup>48</sup> Accordingly, Tugendhat J. held that, on the facts, England was where the damage had been inflicted on the claimant.<sup>49</sup>

(d) *Reaction to the decision in Cooley*

Tugendhat J.’s judgment in *Cooley* strengthened the impression – which had been formed, at first, following the decision in *Booth* – that the English court was beginning to favour a much wider conception of damage, under C.P.R. P.D. 6B para. 3.1(9)(a), than it had traditionally. Indeed, this sense of transition was further reinforced not long after the decision in *Cooley*. In a number of first-instance cases, litigated in quick succession, the English court endorsed the construction outlined in *Booth* and *Cooley* in defining the scope of gateway 9(a): *Harty v Sabre International Security Ltd*,<sup>50</sup> *Wink v Croatia Osiguranje DD*,<sup>51</sup> *Stylianou v Toyoshima*<sup>52</sup> and *Pike v Indian Hotels Co Ltd*.<sup>53</sup>

These cases arose from different factual scenarios. However, in essence, they concerned service-out applications by British claimants, who had suffered life-changing injuries, while abroad, as a result of foreign-based defendants’ wrongdoing. In each case, the defendants challenged the claimants’ reliance on gateway 9(a), as the jurisdictional ground for effecting the service outside the jurisdiction. In particular, they invited the English court to revisit its construction of that provision, as outlined in *Booth* and *Cooley*, and to interpret it, instead, in line with its counterpart measure under the Brussels Regime. In other words, they sought to persuade the court to return to its traditional construction of damage under C.P.R. P.D. 6B para. 3.1(9)(a). In all of these cases, however, the English court declined this invitation. Instead, it favoured the interpretation adopted in *Booth* and *Cooley*. Accordingly, the court stated that the claimants’ case fell within the scope of gateway 9(a), notwithstanding that the damage in England had been sustained *subsequent* to the initial injury, which had been inflicted outside of England. In short, in a limited timeframe, it became increasingly commonplace for the English court to afford a much wider reading to the notion of damage for the purpose subparagraph 9(a).<sup>54</sup>

However, just as this new interpretive stance was becoming more prominent, *Erste Group Bank AG (London) v JSC (VMZ Red October)* went before the Court of Appeal.<sup>55</sup> The dispute in this case had arisen from a loan-transaction agreement. Under the agreement, the claimant bank had undertaken to lend money to the first defendant (‘D1’), a Russian entity. The second defendant (‘D2’), another Russian entity, acted as the guarantor. D1 and D2 defaulted on one of the repayment instalments. The claimant alleged that D1’s and D2’s default had been deliberate and induced by an unlawful-means conspiracy between D1 and D2, and the other defendants, to render D1 and D2 insolvent. One of the heads of action, pursued by the claimant, was in tort. In this respect, the claimant applied for an order to serve tort proceedings against the Russia-based defendants on the grounds that England, where the claimant had its designated Facility Office, was the place in which it had, as a result of the alleged conspiracy and the defendants’ default, sustained damage, for the purpose of gateway 9(a). In response, the defendants argued, *inter alia*, that the gateway should be interpreted consistently with the equivalent provision under the Brussels Regime. Thus, they claim that

<sup>48</sup> [2008] EWHC 129 (QB); [2008] I.L.Pr. 27 at [35].

<sup>49</sup> [2008] EWHC 129 (QB); [2008] I.L.Pr. 27 at [53].

<sup>50</sup> [2011] EWHC 852 (QB).

<sup>51</sup> [2013] EWHC 1118 (QB).

<sup>52</sup> [2013] EWHC 2188 (QB).

<sup>53</sup> [2013] EWHC 4096 (QB).

<sup>54</sup> See also *Saldanha v Fulton Navigation Inc* [2011] EWHC 1118 (Admlty); [2011] 2 Lloyd’s Rep. 206.

<sup>55</sup> [2015] EWCA Civ 379.

the English court lacked jurisdiction under gateway 9(a) as the damage *directly* arising from the defendants' actions had not been felt in England. At first instance, Flaux J. noted that, in *Booth* and *Cooley*, the English court had discussed and dismissed the defendant's contention concerning the need for consistency in the interpretation of C.P.R. P.D. 6B para. 3.1(9)(a), on the one hand, and (what is now) Article 7(2) of the Brussels Ia Regulation, on the other.<sup>56</sup> After a close assessment of the decisions in *Booth*, *Cooley* and *Wink*, Flaux J. concluded that the defendants' argument was "hopeless".<sup>57</sup> He, therefore, held that the claimant had established that, for the purpose of subparagraph 9(a), damage had been sustained in England.

The Court of Appeal, however, unanimously reversed Flaux J.'s ruling. It stated that the conception of the notion of damage under gateway 9(a), in decisions such as *Booth* and *Cooley*, had rendered the measure "extraordinarily wide".<sup>58</sup> The court stated that it held "serious reservations as to whether [they] were right".<sup>59</sup> Nevertheless, those reservations did not appear to be sufficiently serious for the Court of Appeal to overrule the decisions in *Booth*, *Cooley* or any of the other first-instance rulings which had favoured a broader interpretation of the notion of damage. The Court of Appeal relied on an approach to the construction of C.P.R. P.D. 6B para. 3.1(9)(a) which had been similar to that which had been traditionally applied in England. Accordingly, it ruled that, for the purpose of the provision, damage had occurred in New York, where the repayment instalment was due; England was merely where the *consequential* damage had occurred.<sup>60</sup>

Shortly after its ruling in *Erste*, in *Brownlie v Four Seasons Holdings Inc.*,<sup>61</sup> the Court of Appeal once more reiterated its support for a narrower interpretation of damage under gateway 9(a). In *Brownlie*, the claim had arisen following a road-traffic accident in Egypt. As a result of the accident, tragically, the claimant's husband was killed and she had sustained injuries. After returning to England, the claimant commenced service-out proceedings in tort (and contract) against the Canadian defendants, seeking damages for personal injury, loss of dependency and losses in her capacity as her late husband's executrix. In the context of the tortious claim, which is relevant to the present discussion, the claimant relied on cases like *Booth* and *Cooley* in submitting that the *consequential* damage that she had sustained in England was sufficient to bring her case within the scope of gateway 9(a). In response, the defendants pointed to the Court of Appeal's ruling in *Erste* and also earlier decisions in which the English court had construed damage under C.P.R. P.D. 6B para. 3.1(9)(a) in line with the interpretation of Article 7(2) of Brussels Ia Regulation. Accordingly, the defendants argued that, as Egypt (rather than England) was where the *direct* damage arising from the alleged tort had been inflicted, the claimant's case fell outside the scope of gateway 9(a). In a unanimous decision, which partially overturned Tugendhat J.'s judgment at first instance,<sup>62</sup> the Court of Appeal upheld the defendants' submission. Accordingly, the court ruled that only the loss-of-dependency claim fell within the confines of gateway 9(a).<sup>63</sup>

<sup>56</sup> [2013] EWHC 2926 (Comm) at [144].

<sup>57</sup> [2013] EWHC 2926 (Comm) at [147].

<sup>58</sup> [2015] EWCA Civ 379 at [104].

<sup>59</sup> [2015] EWCA Civ 379 at [105].

<sup>60</sup> [2015] EWCA Civ 379 at [107].

<sup>61</sup> [2015] EWCA Civ 665; [2015] C.P. Rep. 40. Noted, I. Bergson, "Consequential loss and the tort gateway" (2016) 132 L.Q.R. 42.

<sup>62</sup> [2014] EWHC 273 (QB).

<sup>63</sup> [2015] EWCA Civ 665; [2015] C.P. Rep. 40 at [85]-[86]. In the course of its reasoning, the Court of Appeal stated that gateway 9(a) should be interpreted in line with Article 4(1) of the Rome II Regulation. For the purpose of Article 4(1), damage is interpreted in precisely the same way as it is under Article 7(2) of the Brussels Ia Regulation: see especially Case (C-350/14) *Florin Lazar v Allianz SpA* EU:C:2015:802; [2016] I.L.Pr. 5.

(e) *Interpreting gateway 9(a): a confusing picture*

The forgoing discussion, in this part, has highlighted the emergence of a clear divergence, over the past decade or so, in the English court's approach to the conception of damage, within the context of C.P.R. P.D. 6B para. 3.1(9)(a). In a number of cases, decided in quick succession and in a relatively short period of time, the English court has widened its interpretation of this provision and held that it includes *any* damage (whether direct or otherwise) sustained by the *immediate* victim (or their family members) within England. This development is out of step with almost two decades of legal precedent and scholarship. It, therefore, has brought inconsistency and confusion to this area of law. This incoherence is also reflected in the discussions within the academic commentary on the meaning of C.P.R. P.D. 6B para. 3.1(9)(a). For example, Professors Clarkson and Hill have been categorical in their rejection of the new interpretation for the provision. They observe that, in so far as the interpretation gateway 9(a) is concerned, *Booth* and *Cooley* "can legitimately be regarded as having been wrongly decided".<sup>64</sup> In the same vein, though in a much more equivocal manner, the editors of *Dicey, Morris and Collins* appear to hold doubts about the accuracy of the position outlined in *Booth* and *Cooley*.<sup>65</sup> However, and perhaps unsurprisingly, Professor Briggs has remained the main advocate for the wider conception of damage under C.P.R. P.D. 6B para. 3.1(9)(a). It is recalled that, as one of the editors of the first five editions of *Civil Jurisdiction and Judgments*, Professor Briggs had long advocated for a broader interpretation to be afforded to the notion of damage under the provision than that envisaged under the traditional approach. In the sixth (and most recent) edition of *Civil Jurisdiction and Judgments*, published in 2015, but before the Court of Appeal's judgments in *Erste* and *Brownlie* had been handed down, he cited the decisions in *Booth* and *Cooley*, among others, stating that "there is no need for 'alignment'" between the interpretation of gateway 9(a) and its equivalent provision within the Brussels Regime.<sup>66</sup>

At first blush, it might be deemed that the clear difference of opinion, within case law and academic commentary, does not pose a pressing problem. After all, the new approach to the interpretation of gateway 9(a) is derived from first-instance authorities, which may be considered to be of little doctrinal significance. Additionally (and, perhaps, more importantly), in *Erste* and *Brownlie*, the Court of Appeal appears to have cast doubt on the reliability of these decisions, in particular, and their reading of damage under C.P.R. P.D. 6B para. 3.1(9)(a), in general.

Be that as it may, it is argued that, it would be a mistake not to address the evident confusion within the English case law surrounding the construction of gateway 9(a). It is true that, in *Erste* and *Brownlie*, the Court of Appeal was critical of the broader conception of damage, which had been endorsed in first-instance authorities such as *Booth* and *Cooley*. However, on both occasions, the Court of Appeal fell short of definitively discarding it.<sup>67</sup> Put

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<sup>64</sup> C.M.V. Clarkson and J. Hill, *The Conflict of Laws*, 4<sup>th</sup> edn., (Oxford: Oxford University Press, 2011), at p. 111. See also J. Hill and A. Chong, *International Commercial Disputes: Commercial Conflict of Laws in English Courts*, 4<sup>th</sup> edn., (Oxford: Hart Publishing, 2010), at para. 7.3.31.

<sup>65</sup> Lord Collins of Mapesbury, *et al*, *Dicey, Morris & Collins on the Conflict of Laws*, 15<sup>th</sup> edn., (London: Sweet & Maxwell, 2012), Rule 34, at para. 11.216 (fn. 600). See also J.J. Fawcett and J.M. Carruthers, *Cheshire, North & Fawcett's Private International Law*, 14<sup>th</sup> edn., (Oxford: Oxford University Press, 2008), at p. 386.

<sup>66</sup> A. Briggs, *Civil Jurisdiction and Judgments*, 6<sup>th</sup> edn., (Abingdon: Informa Law from Routledge 2015), at para. 4.73.

<sup>67</sup> In *Erste*, the Court of Appeal appeared to distinguish those cases from the matter before it, which had concerned damage as a result of non-payment of a sum: [2015] EWCA Civ 379 at [105]. In the same vein, and notwithstanding its statements to the contrary, the court's decision in *Brownlie* to entertain the loss-of-dependency claim allowed for an *indirect* loss to form the basis for service out under gateway 9(a): [2015] EWCA Civ 665; [2015] C.P. Rep. 40 at [86].

simply, the door has been left ajar for the more-expansive interpretation of gateway 9(a) to be relied on in future cases. In these circumstances, and given that this approach has Professor Briggs's categorical endorsement, there is every prospect for it to form the basis for the English court's decision making in tort service-out cases.

In short, it is argued that, there is still scope not only for the confusion surrounding the precise scope of subparagraph 9(a) to continue, but also, to become potentially even more stark. Hence, the next part of the discussion seeks to take steps towards clarifying the uncertainty in this area. Accordingly, its chief intention is to put forward a reasoned case in favour of upholding the most plausible approach, from those highlighted in the existing cases, to the construction of the notion of damage sustained within the jurisdiction under gateway 9(a).

#### **IV. How Should C.P.R. P.D. 6B para. 3.1(9)(a) Be Interpreted?**

As the point of departure, for the discussion in this section, it is useful to start by revisiting the main basis on which the recently-developed conception of C.P.R. P.D. 6B para. 3.1(9)(a) has been founded. It is recalled that, traditionally, the English court's reading of the provision had been in line with the scope of the jurisdiction rule (now set out) under Article 7(2) of the Brussels Ia Regulation. In other words, similar to that rule of jurisdiction, only damage that was *directly* felt by the *immediate* victim of the alleged tortious conduct fell within the confines of gateway 9(a).

The main driving force behind the emergence of a wider reading of gateway 9(a) is the view that, in a service-out case, the English court's assumption of jurisdiction is discretionary and, ultimately, dependent on whether it is *forum conveniens*. This position differs from that under Article 7(2). Under Article 7(2), the court before which the dispute has been brought has no discretion whether to entertain the case; if the matter falls within the scope of Article 7(2), it *must* hear it. Therefore, the fact that a claimant, in a service-out case, has to persuade the court that it is the proper forum for entertaining the dispute has been considered, by itself, to be sufficient to justify affording a broader meaning to the notion of damage under gateway 9(a) than that which has been ascribed to Article 7(2) of the Brussels Ia Regulation. In this respect, Professor Briggs's observation in the following passage, in the latest edition of *Civil Jurisdiction and Judgments*, distils clearly the reasoning central to the development of a divergent interpretation for gateway 9(a):

“the function of Article 7(2) as an exception to the jurisdiction of Article 4, and as a rule of special jurisdiction not further controlled in its application by a principle of *forum conveniens*, is quite separate and distinct, and has a function quite different, from subparagraph 9(a). For where jurisdiction is to be asserted under [C.P.R. P.D. 6B para. 3.1(9)(a)], the claimant must also, separately, clearly and distinctly, satisfy the requirement of *forum conveniens* before the court will authorise service to be made out of the jurisdiction. There is therefore no need for ‘alignment’ with a jurisdictional rule which serves a quite different function”.<sup>68</sup>

Nonetheless, it is argued that, for four main reasons, this recently-developed interpretation for the gateway is open to question and, in fact, should be abandoned. Instead, the English court should definitively uphold its traditional construction, thereby, confining its reading of subparagraph 9(a) to a framework which is consistent with the interpretation of Article 7(2) of the Brussels Ia Regulation.

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<sup>68</sup> A. Briggs, *Civil Jurisdiction and Judgments*, 6<sup>th</sup> edn. (Abingdon: Informa Law from Routledge 2015), at para. 4.73 (citations omitted).

The first reason for this contention is that the consideration at the heart of the English court's more-recent pronouncements<sup>69</sup> is a *non sequitur*: in logical terms, it would only work if it is predicated on the assumption that the *forum conveniens* requirement has only just been introduced into English law. Such an assumption would be misplaced, however. It is well known that, in the context of service-out cases, the English court had applied the *forum conveniens* principle long before the formal recognition of its sister doctrine (of *forum non conveniens*), in *Spiliada Maritime Corporation v Cansulex Ltd*,<sup>70</sup> for cases concerning stays of as-of-right proceedings. As long ago as 1925, in *Rosler v Hilbery*, Pollock M.R. observed that

“The [service-out] jurisdiction is discretionary, and there is no question that in deciding whether or not it will exercise its discretion the Court pays attention to a great number of matters, in particular it would pay attention to what is the *forum conveniens*”.<sup>71</sup>

Those whom, in 1987, introduced the jurisdictional gateway (which is now) outlined under subparagraph 9(a), must have been surely aware of the existence of the *forum conveniens* condition. Nevertheless, they adopted a wording for the new gateway which mirrored the interpretation afforded to the special jurisdiction rule, (currently spelt out) under Article 7(2) of the Brussels Ia Regulation, as elaborated on in the *Bier* case. Furthermore, for nearly two decades, and *despite* the existence of the *forum conveniens* requirement, the English court had interpreted the gateway in line with the construction of Article 7(2). At no stage, in that period and until the judgment in *Booth*, was there any intimation in the case law, concerning the interpretation of gateway 9(a), that the *forum conveniens* criterion had any influence on the construction of that provision. Thus, it is difficult to see what has suddenly changed to render persuasive the viewpoint, central to the recent developments in the case law, that the *forum conveniens* condition justifies a wider conception of gateway 9(a).

The second (and arguably more significant) consideration in favour of an outright abandonment of the broader interpretation of damage under C.P.R. P.D. 6B para. 3.1(9)(a) is that it inevitably leads to a disproportionate expansion of this aspect of the English court's service-out jurisdiction.<sup>72</sup> The basis for this contention is that, contrary to the reasoning underpinning the emergence and development of the new constructive model, the *forum conveniens* test is not sufficiently well-placed to mitigate the expansionary effect of departing from the English court's traditional reading of gateway 9(a). In this regard, the English court's decisions in cases like *Cooley*, *Wink*, *Stylianou* and *Pike* are especially illustrative. As discussed earlier, in all these cases, the claimants had suffered serious injuries, attributable to foreign-based defendants, while outside England. They sought redress for damage which had directly occasioned *elsewhere* (and only subsequently felt in England).<sup>73</sup> The life-changing nature of the injuries, among other factors, had meant that the claimants would have faced serious difficulties in bringing their claims in the forum where the tortious act had happened (and the direct damage arising from it had been sustained). Therefore, by their very nature, these were not the type of cases in which, following the *forum conveniens* analysis, the English court was likely to arrive at any conclusion other than to sustain its proceedings.

<sup>69</sup> E.g. Nigel Teare Q.C. in *Booth* [2004] EWHC 1437 (Comm); [2004] 1 W.L.R. 3292 at [36]; Haddon-Cave J. in *Wink* [2013] EWHC 1118 (QB) at [41]; Sir Robert Nelson in *Stylianou* [2013] EWHC 2188 (QB) at [43]-[46]; and, Stewart J. in *Pike* [2013] EWHC 4096 (QB) at [18].

<sup>70</sup> [1987] A.C. 460.

<sup>71</sup> [1925] Ch. 250 at 259.

<sup>72</sup> See also the Court of Appeal's judgment in the *Erste Group Bank* case [2015] EWCA Civ 379 at [104].

<sup>73</sup> In *Booth*, where the claimant's husband had died in the accident, the damage in question, for the purpose of C.P.R. P.D. 6B para 3.1(9)(a), had been sustained by a party *other than* the immediate victim of the tort.

Indeed, in all of these cases, the English court went on to conclude that it was the proper place in which the claim could be entertained.<sup>74</sup> In light of the outcome of the *forum conveniens* analysis in these cases, it is reasonable to speculate that, in the context of cases similar to these, the loosening of the connection requirement – by widening the interpretation of the relevant gateway – would almost always lead to the English court assuming jurisdiction over the foreign-based defendant. However, had the English court relied on its traditional reading of gateway 9(a), it would not have had jurisdiction over them. Consequently, it is argued that the existence of the *forum conveniens* threshold will not be a robust enough barrier to stem the tide of cross-border tort cases in which the English court could assert jurisdiction by means of *ex juris* service of proceedings.

By the same token, a third reason for departing from a wider conception of C.P.R. P.D. 6B para. 3.1(9)(a), and reverting to the (narrower) traditional interpretation of the provision, can be advanced. In this respect, it is argued that, both in principle and policy terms, it would be undesirable to expand the scope of jurisdictional gateways within the C.P.R.. In recent years, there have been a number of judicial pronouncements, highlighting a degree of relaxation, on the part of the English court, in relation especially to the *procedural* requirements which a claimant must meet in order to obtain the English court's permission for the service of the proceedings outside the jurisdiction. A helpful summary of these changes can be found in Professor Briggs's *Private International Law in English Courts*. For example, Professor Briggs has noted that, based on the U.K. Supreme Court's ruling in *NML Capital Ltd v Argentina*,<sup>75</sup>

“it is no longer the case that a claimant is limited to defending his permission to serve out on the Grounds which he originally identified as being available to him when he applied for it, or which were in the notice which accompanied service on the defendant: if it should appear that another service Ground might have been more plausibly relied on, he will be permitted to rely on it, at least if he does not need to amend his claim form to do so”.<sup>76</sup>

Additionally, Professor Briggs has pointed to the judgment of the U.K. Supreme Court in *Abela v Baadarani*,<sup>77</sup> observing that

“it is no longer the case, if ever it really was, that a claimant who faces difficulty in tracking down a defendant who lurks and hides overseas will find access to justice barred by inability to effect service, for the court has power to order that service was properly made if satisfied that the claimant did his best and that defendant knew perfectly well of the claim in the documents whose service he was doing his best to evade”.<sup>78</sup>

In this case, and in the context of a question concerning the service-out *process*, Lord Sumption had remarked that, if the claimant is able to show that England is *forum conveniens*, “it should no longer [then] be necessary to resort to the kind of muscular presumptions against service out which are implicit in adjectives like ‘exorbitant’”.<sup>79</sup>

<sup>74</sup> In so far as the decision in *Pike* was concerned, the court's ruling on the *forum conveniens* point had been influenced by the claimant's contention that he would face significant delay if he were to seek redress against the defendant in India, where the harmful event had happened.

<sup>75</sup> [2011] UKSC 31; [2011] 2 A.C. 495.

<sup>76</sup> A. Briggs, *Private International Law in English Courts*, (Oxford: Oxford University Press, 2014), at para. 4.458 (citations omitted).

<sup>77</sup> [2013] UKSC 44; [2013] 1 W.L.R. 2043. Noted, A. Briggs, “Service Out in a Shrinking World” [2013] L.M.C.L.Q. 415 and A. Dickinson “Service abroad – an inconvenient obstacle?” (2014) 130 L.Q.R. 197.

<sup>78</sup> A. Briggs, *Private International Law in English Courts*, (Oxford: Oxford University Press, 2014), [4.458] (citations omitted).

<sup>79</sup> [2013] UKSC 44; [2013] 1 W.L.R. 2043 at [53].

For the most part, these developments have come about in order to make the *process* of granting a permission to service out of the jurisdiction more pragmatic;<sup>80</sup> their basic effect has been to make it less onerous, from a *procedural* viewpoint, for a claimant to commence service-out proceedings in England. It does not necessarily follow that this apparent *procedural* relaxation in the English court's approach to dealing with service-out applications also warrants a looser treatment of the *jurisdictional* gateways within the C.P.R.. Indeed, in these circumstances, it is scarcely desirable, it is contended, for the English court to further expand its service-out *jurisdiction*. After all, and notwithstanding observations to the contrary,<sup>81</sup> the English court's service-out jurisdiction is widely regarded to be exorbitant.<sup>82</sup> Accordingly, it is argued that the English court should remain restrained in its interpretation of the specific gateways, thereby ensuring that it is not tilting the balance, unduly, in the claimant's favour.

The fourth (and final) argument in favour of reverting to the traditional interpretation of gateway 9(a) is that it represents the best way of upholding the central objective for which that provision (and others within the C.P.R.) had been originally created. In policy terms, in the context of cross-border commercial disputes in England, one of the key considerations is to assess whether there is a sufficient link between the defendant and the forum to justify the English court's assertion of jurisdiction. This connection could typically be established based on the defendant's submission to the English proceedings, presence or domicile in England or conduct. In the context of a service-out case, the C.P.R. gateways signify points of connection between the defendant (or his actions) and England. The case in question must fall within at least one of these gateways before the English court can decide whether to assume jurisdiction over it. The threshold for the connection between the defendant and England must be set at an appropriate level to warrant the assertion of jurisdiction. It is argued that this objective is met if the provision is interpreted in a way which would not undermine the defendant's reasonable expectation – namely, that he would only be summoned to defend the English proceedings if there was some form of connection between his conduct and England. However much one might sympathise with the claimants in cases like *Booth*, *Cooley*, *Wink*, *Stylianou* and *Pike*, for the purpose of gateway 9(a), the defendants (or their actions) in these cases had no connection with England: the claimants' *indirect* (and consequential) losses in England provided, it is argued, too tenuous a link between the tortfeasors and England to justify the English court's assertion of jurisdiction. In other words, there was simply nothing in these cases to amount to a strong-enough link between the defendants and England as to justify tilting the jurisdictional balance to England. It is, therefore, contended that the objective at the heart of the creation of gateway 9(a) would be best served if the court decidedly reverted to its traditional interpretation of that provision and read it consistently with the interpretation of (what is now) Article 7(2) of the Brussels Ia Regulation.

## V. Conclusion

The principal intention of this article has been to examine the English court's approach to the interpretation of the notion of "damage", for the purpose of C.P.R. P.D. 6B para. 3.1(9)(a).

<sup>80</sup> Indeed, in the context of the facts in *Abela v Baadarani*, Professor Briggs has regarded the ruling to be "a textbook piece of common law and common sense": A. Briggs, "Service Out in a Shrinking World" [2013] L.M.C.L.Q. 415 at 415.

<sup>81</sup> L. Collins, "Temporary presence, exorbitant jurisdiction and the US Supreme Court" (1991) 107 L.Q.R. 10 and L. Collins, "Sovereignty and exorbitant jurisdiction" (2014) 130 L.Q.R. 555.

<sup>82</sup> See e.g. the judgments of Scott L.J., in *George Monro Ltd v American Cyanamid & Chemical Corporation* [1944] K.B. 432 at 437, and Diplock L.J. (as he then was), in *Mackender v Feldia AG* [1967] 2 Q.B. 590 at 599.

This provision was first brought into (what is now) the C.P.R. in 1987. It is one of two gateways through which a claimant, in a cross-border tortious claim, could seek to obtain the English court's permission for service of the proceedings outside the jurisdiction.

The preceding analysis has shown that, even though it has been in existence for the best part of three decades, the precise meaning of gateway 9(a) is still somewhat unclear. Part II of the discussion highlighted that, traditionally, and for over a decade and a half after its introduction, the English court conceived of damage in a consistent manner with the CJEU's jurisprudence on the construction of (what is now) Article 7(2) of the Brussels Ia Regulation. Accordingly, only damage *directly* sustained by the *immediate* victim of the alleged tortious conduct fell within the scope of gateway 9(a). Part III, then, went on to show that, over the past decade or so, there has been an apparent departure on the part of the English court from that traditionally-held stance. In this respect, the analysis demonstrated the emergence of a preference, on the part of the English court, for a wider interpretation of C.P.R. P.D. 6B para. 3.1(9)(a) which encompasses *indirect (as well as direct)* damage sustained by the victim (or their family members) in England. Although, in view of the Court of Appeal's recent decisions in *Erste* and *Brownlie*, this change of tack may now be regarded as having been aborted, it was argued that the door has not been firmly shut on the more-expansive conception of damage. There is still much scope for the approach to be applied again and, thereby, for the confusion surrounding the precise meaning of gateway 9(a) to endure.

In these circumstances, Part IV of the discussion sought to advance a reasoned case in favour of upholding the most plausible approach, from those currently outlined in the case law, to the construction of the notion of damage under gateway 9(a). Four key arguments were advanced in support of the view that the English court should unequivocally abandon the broader construction of C.P.R. P.D. 6B para. 3.1(9)(a) and, instead, read the provision in line with the interpretation of Article 7(2) of the Brussels Ia Regulation. It is argued that such a step would bring much certainty and clarity to this aspect of the English conflict-of-laws rules.